



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS-SC-18-0099; SC19-981-1 FR]

**Almonds Grown in California; Revisions to the Accepted User
Program Requirements and New Information Collection**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Almond Board of California (Board) to revise the almond accepted user program requirements currently prescribed under the Marketing Order for Almonds Grown in California (Order). This rule prohibits the transfer of inedible material between accepted users, implements a new information collection form and makes a conforming change to an existing form.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Peter R. Sommers, Marketing Specialist, or Terry Vawter, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: PeterR.Sommers@usda.gov or Terry.Vawter@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Board locally administers the Order and is comprised of growers and handlers operating within California.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it

does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule requires accepted users to dispose of inedible material within six months of receipt, submit public weighmaster weight certificates within 10 business days of receipt of inedible material, and submit an accepted user plan annually. In addition, this action prohibits the transfer of inedible material between accepted users, establishes a new information collection, and makes a conforming change to an existing form. The Board unanimously recommended these changes at its December 4, 2018, meeting.

Section 981.42 provides authority for the Board to impose quality control requirements. Paragraph (a) of that section obligates each handler to have their almonds inspected to determine the percentage of inedible kernels out of the total kernel weight received. Inspection results are sent to the Board. Inedible kernels in excess of two percent of the total represent the handler's "inedible disposition obligation" (obligation). Handlers are required to dispose of their obligation by delivering it to the Board or an approved accepted user (crusher, feed manufacturer, feeder, or dealer in nut waste). This section also gives the Board the authority to establish rules and regulations necessary and incidental to the administration of the inedible program.

Quality control requirements in section 981.442(a)(7) contain requirements to which accepted users must adhere to be eligible to receive disposition obligations. These include completing an application and business data sheet, maintaining prompt and accurate reporting of disposition notices, and providing a public weighmaster weight certificate for each lot received. The Board may deny or revoke accepted user status at any time if the accepted user fails to meet these terms and conditions.

Proper delivery of the obligation is tracked and credited to the handler through the completion of the Board's "Form 8 - Inedible and Exempt Outlet Disposition." Part A of the form is submitted to the Board by the handler and Part B, supported by a public weighmaster weight certificate, is submitted to the Board by the accepted user. The Order currently does not specify deadlines by which accepted users are required to dispose of inedible kernels or when to submit the public weighmaster weight certificate to the Board. With no specified deadlines, accepted users are not required to dispose of the inedible kernels in the same crop year they received the material. This has led to handlers not receiving timely credit for their disposition obligation.

This final rule requires accepted users to dispose of inedible material within six months of receipt and to submit public weighmaster weight certificates within 10 business days of receipt of inedible material. These changes are expected to improve the timeliness and proper tracking of handler disposition obligations.

This rule requires submission of an annual accepted user plan, which provides a detailed description of how the accepted user receives, stores, uses, and documents inedible material received. This is an additional verification tool during accepted user annual reviews. The rule also specifies that an application and business sheet must be completed and submitted annually, as well. Additionally, this rule implements conforming changes to an existing form.

Current regulations do not prohibit the transfer of inedible material between accepted users; therefore, material may be transferred an unlimited number of times between accepted users, making handler disposition obligations increasingly difficult to properly track and verify. Specifying deadlines for submission of required documentation, requiring the annual submission of an accepted user plan, along with prohibiting the transfer of product between accepted users, will increase the

effectiveness of the Board's compliance and verification activities.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 6,800 almond growers in the production area and approximately 100 almond handlers subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$30,000,000, and small agricultural producers are defined as those having annual receipts of less than \$1,000,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its most recent (2017) Agricultural Census that there were 7,611 almond farms in the production area (California), of which 6,683 had bearing acres. The following computation provides an estimate of the proportion of agricultural producers (farms) and agricultural service firms (handlers) that would be considered small under the SBA definitions.

The NASS Census data indicate that out of the 6,683 California farms with bearing acres of almonds, 4,425 (66 percent) have fewer than 100 bearing acres.

For the almond industry's most recently reported crop year (2017), NASS reported an average yield of 2,270 pounds per acre and a season average grower price of \$2.53 per pound. A 100-acre farm with an average yield of 2,270 pounds per acre would produce about 227,000 pounds of almonds. At \$2.53 per pound, that farm's production would be valued at \$574,310. The Census of Agriculture indicates that the majority of California's almond farms are smaller than 100 acres; therefore, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2017-18 of less than \$574,310, which is below the SBA threshold of \$1,000,000. Thus, over two-thirds of

California's almond growers may be classified as small businesses according to SBA's definition.

There is no representative handler price available. Therefore, to estimate the proportion of almond handlers that may be considered small businesses, the unit value per shelled pound of almonds exported was used as a reasonable representation of a handler-level price. A unit value for a commodity is the value of exports divided by the quantity. Data from the Global Agricultural Trade System database of USDA's Foreign Agricultural Service showed that the value of almond exports from August 2016 to July 2017 (combining shelled and inshell almonds) was \$4.072 billion. The quantity of almond exports over that time period was 1.406 billion pounds, combining shelled exports and the shelled equivalent of inshell exports. Dividing the export value by the quantity yields a unit value of \$2.90 per pound. Subtracting this figure from the NASS 2016 estimate of season average grower price per pound (\$2.44) yields \$0.46 per pound as a representative grower-handler margin. Applying the \$2.90 representative handler price per pound to 2016-17 handler shipment quantities provided by the Board shows that approximately 40 percent of California's almond handlers shipped almonds valued under \$30,000,000 for that crop

year. Therefore, 40 percent of handlers may be considered small businesses according to the SBA definition.

This rule requires, among other things, accepted users to dispose of inedible material within six months of receipt, submit public weighmaster weight certificates within 10 business days of receipt of inedible material, submit an annual accepted user plan, and prohibits the transfer of inedible material between accepted users. Authority for this action is provided in § 981.42(a) of the Order. The Board recommended this action at a meeting on December 4, 2018.

It is not anticipated that this action would impose additional costs on handlers, growers, or accepted users, regardless of size. These changes are expected to increase the effectiveness of the Board's verification and compliance activities.

The Board considered alternatives to this action, including not changing the current accepted user eligibility requirements. Prior to making its recommendation to the Secretary, a taskforce was created by the Board to review the accepted user program and make recommendations to the Board's Almond Quality, Food Safety and Services Committee (Committee). The Committee reviewed the program and the taskforce's recommendations and determined that

the recommended changes were necessary to ensure the continued effectiveness of the program. Therefore, the Committee unanimously recommended this action to the Board.

This rule imposes additional reporting and recordkeeping requirements on companies that voluntarily participate in the accepted user program. Accepted users are required to dispose of inedible material within six months of receipt, submit public weighmaster weight certificates within 10 business days of receipt of inedible material, submit an annual accepted user plan, and are prohibited from transferring inedible materials.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule. No public comments were received regarding the initial regulatory flexibility analysis.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Board's meeting was widely publicized throughout the almond industry, and all interested persons were invited to attend the meeting and participate in Board deliberations. Like all Board meetings, the December 4, 2018, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue.

Also, the Board has a number of appointed committees to review certain issues and make recommendations to the Board. The Committee met and discussed this issue in detail. That meeting was also a public meeting, and both large and small entities were able to participate and express their views.

A proposed rule concerning this action was published in the *Federal Register* on July 12, 2019 (84 FR 33182). Copies of the proposed rule were provided to Board members and California almond handlers. Additionally, the proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending August 12, 2019, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, USDA will make no changes to the rule as proposed.

AMS submitted a request to OMB for approval to modify three existing forms and create one new form in relation to the

accepted user program. Once approved, the new information collection will be merged with the forms currently approved under OMB No. 0581-0178 Vegetable and Specialty Crops. This process for seeking approval of information collection requirements complies with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). Should additional changes become necessary, AMS will submit them to OMB for approval.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is amended as follows:

PART 981 - ALMONDS GROWN IN CALIFORNIA

1. The authority citation for part 981 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In § 981.442, revise paragraph (a)(7) to read as follows:

§ 981.442 Quality control.

(a) * * *

(7) *Accepted Users.* An accepted user's eligibility shall be subject to the following criteria:

(i) Annual completion of an application with the Board for accepted user status;

(ii) Annual submission of a business data sheet to the Board;

(iii) Annual submission of an Accepted User Plan (Form ABC 30) to the Board by July 31 of each year;

(iv) The accurate and prompt submission of Form ABC 8, Part B, to the Board for each lot of almonds received. Each lot of inedible almonds received must be documented by a public weighmaster weight certificate issued at the request of the

accepted user at the time of receipt of the lot. Weighmaster weight certificates must be submitted to the Board within 10 business days of issuance;

(v) Disposal of inedible almond material within 6 months of receipt; and

(vi) Disposal of inedible almond material received with no transfer of the material between accepted users.

(vii) The Board may deny or revoke accepted user status at any time if the applicant or accepted user fails to meet the terms and conditions of §981.442, or if the applicant or accepted user fails to meet the terms and conditions set forth in the accepted user application (Form ABC 34).

(viii) The eligibility of accepted users shall be reviewed annually by the Board. Handlers will not receive credit towards their disposition obligations pursuant to paragraph (a)(4) of this section for inedible lots where the difference between the weight of the lot reported by the inspection agency on Form ABC 8 and the weight of the lot reported on the public weighmaster weight certificate exceeds 2.0 percent.

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Dated: November 21, 2019.

Bruce Summers,

Administrator,

Agricultural Marketing Service.

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